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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. LARELL RAVON BURNS, Defendant and Appellant.	G039832 (Super. Ct. No. 07WF1186) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William R. Froeberg, Judge. Affirmed in part and reversed in part and remanded for resentencing.

Joseph T. Tavano, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Angela Borzachillo and Peter Quon, Jr., Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Larell Ravon Burns of second degree burglary (Pen. Code, §§ 211, 212.5, subd. (c); all further statutory references are to this code) and street terrorism (§ 186.22, subd. (a)), but did not find he committed the robbery for the benefit of a criminal street gang under section 186.22, subdivision (b)(1) and the allegation was dismissed. The court sentenced him to five years and eight months in prison, consisting of the upper five-year term for robbery and a consecutive eight months or one-third the middle term for street terrorism. Defendant appeals, arguing the evidence was insufficient to support his street terrorism conviction and the court erred in sentencing him to the upper term on the robbery conviction. We reject the latter but find merit to defendant's first contention and reverse his conviction for street terrorism. The matter is remanded for resentencing. In all other respects, the judgment is affirmed.

FACTS

Late one night in April 2007, police officer Jonathan Wainwright assisted in stopping defendant and Gregory Davenport across the street from the Garden Grove Medical Center, located a quarter of a mile from the Lincoln Education Center. Wainwright noticed defendant was "very tall," about six feet two inches, while Davenport was "much shorter," approximately five feet six inches tall. Defendant told Wainright his girlfriend, Kenya Kent, had just given birth to his child at the medical center and that he was from Los Angeles where he was an active member of the Five Nine Hoover Crips gang (Hoover gang). Davenport is Kent's stepbrother.

The next night around 10:30 p.m., Luan Nguyen was cleaning a classroom at the education center when two men entered and took his wallet, cell phone, and school keys. He identified defendant in a photographic lineup as one of the robbers and at trial as the taller of the two men. Nguyen was shown a second photographic lineup containing

Davenport's picture but was unable to identify him or anyone else as the person with defendant.

Wainwright arrived at Kent's apartment an hour later looking for defendant. Kent said she last saw him at 10:00 p.m. when he left with Davenport. Her apartment was one quarter mile from where Nguyen was robbed.

Defendant was detained two weeks later in Los Angeles wearing an orange T-shirt, orange bandana, and orange shoelaces; he also had an orange cigarette lighter. The color orange is synonymous with the Hoover gang. When questioned by police officer William Allison, defendant said he had been associating with that gang for about three years.

Although defendant denied robbing Nguyen, when Allison presented him with a scenario of what he thought happened during the robbery, defendant stated, "we did not have a gun." None of Nguyen's property was found with defendant and there is no evidence defendant wore orange gang colors, flashed gang signs, or stated any gang slogans at the time of the robbery. Allison opined defendant's motive for the robbery was to both support his child and bolster his reputation within the gang and that of the gang.

Gang expert Sean Kinchla had past contacts with Davenport and defendant, both of whom admitted to being Hoover gang members. Although the gang claims as its territory an area east of the 110 freeway in Los Angeles, it frequently commits robberies both "in their own turf [and] in other areas" because it is lucrative, both for the robber and the gang which often taxes the robber for a portion of the proceeds, and is a crime of violence that increases the reputation of the robber and the gang. Other primary activities include murder, assaults with deadly weapons, and narcotic sales.

Kinchla opined the robbery in this case was committed for the benefit of and in association with the Hoover gang based on the facts defendant actively participated in the gang, had documented prior contact with law enforcement, traveled to

Garden Grove from his residence in Los Angeles, and robbed the victim at gunpoint with a gang associate. His opinion was enhanced by the fact defendant was in the neighborhood the previous night and had left a residence near the robbery scene with a gang associate 25 minutes before the crime occurred. According to Kinchla, the robbery benefitted the gang because "[a]ny time anything of value is taken, whether it be money or items than can be sold for currency or vehicle or keys to a vehicle, it benefits the gang [because t]he money can be used to purchase other things for the gang, whether it be weapons, narcotics that can be sold, . . . [or] spray paint for tagging." It also enhanced the reputations of the individual committing the crime and the gang and the fact defendant was with another Hoover gang member when Nguyen was robbed evidenced the crime was committed for the benefit of a criminal gang.

But Kinchla acknowledged on cross-examination that not all crimes committed by a gang member are for the benefit of the gang and instead can be for personal gain unrelated to the gang, such as where money is needed to pay bills. Based on his conversations with gang members, gang members who "freelance[]" or commit crimes for personal gain typically are not active within the neighborhood and do not go back into the area. A gang member from Los Angeles in Orange County visiting his girlfriend who had just given birth to his child might commit a crime to support her and the baby.

Kinchla based his opinion the crime was gang-related on "just the names of the possible suspects" and their status as gang members. Kinchla had not heard the robbers wore gang colors or used slogans. Nor did he have any evidence the Hoover gang received any taxes from the robbery or that knowledge of the crime traveled from Orange County back to Hoover gang members, although some knew about defendant's arrest. According to Kinchla, getting arrested can enhance a gang member's credibility because it shows "you have put in work," and that in turn benefits a gang's reputation.

He conceded the robbery would not instill fear of the gang in the victim and the Orange County community because there was no indication it was committed by gang members.

DISCUSSION

1. Sufficiency of the Evidence to Support Street Terrorism Conviction

Section 186.22, subdivision (a) punishes "[a]ny person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity[] and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang . . . ." This offense thus has three elements: "Active participation in a criminal street gang, in the sense of participation that is more than nominal or passive, . . . 'knowledge that [the gang's] members engage in or have engaged in a pattern of criminal gang activity,' and . . . the person 'willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang.' [Citation.]" (*People v. Lamas* (2007) 42 Cal.4th 516, 523.)

The third element has been interpreted to mean the statute "applies to the perpetrator of felonious gang-related conduct as well as to the aider and abettor." (*People v. Ngoun* (2001) 88 Cal.App.4th 432, 436.) Although "section 186.22(a) does not require that the crime be for the benefit of the gang" (*People v. Martinez* (2008) 158 Cal.App.4th 1324, 1334) because its "gravamen is the *participation in the gang itself*" (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467), defendant must still have the "'objective to promote, further or assist that gang in its felonious conduct . . . '" (*People v. Ngoun*, *supra*, 88 Cal.App.4th at p. 436). Defendant challenges only this element, contending his street terrorism conviction must be reversed because there was insufficient evidence that he committed or aided and abetted gang-related felonious conduct. Reviewing the record in the light most favorable to the judgment, we agree.

There was no evidence that during the robbery defendant or his accomplice claimed to be a Hoover gang member, wore clothing indicating gang affiliation, displayed gang signs, or spoke gang slogans. The crime was committed not only outside of the Los Angeles territory claimed by the Hoover gang, but in a different county altogether. And as Kinchla acknowledged, the robbery would not instill fear of the Hoover gang in the Orange County community because there was no indication gang members had committed it.

Nor was there any evidence defendant aided or abetted felonious conduct by other members of his gang. Defendant was not charged with aiding and abetting the current crime and although the prosecution presented evidence of robberies committed by other gang members, no evidence linked defendant to these crimes either as a participant or an aider and abettor.

The Attorney General argues sufficient evidence supports defendant's street terrorism conviction because (1) "[h]e was an active member of a criminal street gang, e.g., the Hoover street gang[; (2)] [a] reasonable inference was established that he acted in concert with . . . Davenport who is also an active Hoover gang member to rob victim Nguyen[; and (3) . . . defendant] and Davenport robbed Nguyen, e.g., committed a felony crime, and that conduct assisted, furthered, or promoted felonious criminal conduct of the Hoover gang by demonstrating their willingness to commit crimes, the primary gang purpose, and possibly share the proceeds of the robbery with the gang." We are not persuaded.

Defendant has not disputed whether there was sufficient evidence he was an active participant in the Hoover gang. Additionally, even if Davenport was the one who accompanied defendant to the robbery, all that shows is it was committed by two members of the same gang, not that it was gang related or that defendant had the "'objective to promote, further or assist that gang in its felonious conduct . . . .'" (*People v. Ngoun*, *supra*, 88 Cal.App.4th at p. 436.) As for the crime "demonstrating their

willingness to commit crimes . . . and possibly share the proceeds" no evidence exists that the Hoover gang claimed credit for the robbery or profited from it, or that news of it had spread to other Hoover gang members or the community, thereby increasing defendant's and the gang's stature.

Kinchla did testify some Hoover gang members knew the defendant had been arrested, which can enhance a gang member's credibility by showing a willingness to put in work for the gang, thereby benefiting its reputation. Such generalized notions of gang customs and habits are insufficient to sustain a street terrorism conviction without some evidence the crime was gang related.

Generally the "testimony of a single witness is sufficient to support a conviction" (*People v. Young* (2005) 34 Cal.4th 1149, 1181), and "expert testimony about gang culture and habits is the type of evidence a jury may rely on to reach a verdict on a gang-related offense or a finding on a gang allegation[citation]" (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 930). But a gang expert's testimony alone is insufficient to prove an offense is gang related (*id*. at p. 931) and unlike *People v. Ferraez* and other cases finding similar testimony sufficient, Kinchla's testimony was not "coupled with other evidence from which the jury could reasonably infer the crime was gang related" (*ibid.*). Although there was evidence defendant was an active participant in the Hoover gang, mere membership in a gang is insufficient to establish a crime is gang related. (*People v. Gardeley* (1996) 14 Cal.4th 605, 623.) Without some evidence to connect the robbery to the Hoover gang, Kinchla's testimony was insufficient to sustain a conviction for street terrorism. Rather, it was an improper opinion on the ultimate issue that "did nothing more than inform the jury how [he] believed the case should be decided." (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 658.)

As Kinchla acknowledged, other than the names of the suspects and their status as Hoover gang members, nothing about the robbery indicated it was gang related. Simply put, the record shows only that this was a robbery committed by a person who

happened to be a gang member, not that a gang member committed the robbery to promote his gang.

2. Upper Term Sentence

Defendant contends the trial court abused its discretion by imposing the upper term. We disagree.

The trial court can constitutionally impose the upper term, without any jury findings, based upon the defendant's prior convictions. (*People v. Black* (2007) 41 Cal.4th 799, 818.) This area of permissible judicial fact finding "include[s] not only the fact that a prior conviction occurred, but also other related issues that may be determined by examining the records of the prior convictions. [Citations.]" (*Id*. at p. 819.) Specifically, it includes the fact that a defendant's prior convictions are "'numerous or of increasing seriousness'" (*id*. at pp. 819-820); that the defendant was on probation or parole when the crime was committed (*People v. Morton* (2008) 159 Cal.App.4th 239, 251; *People v. Yim* (2007) 152 Cal.App.4th 366, 371); and that the defendant's prior performance on probation or parole was unsatisfactory (*People v. Yim*, *supra*, 152 Cal.App.4th at p. 371). Once the trial court properly finds any one of these factors, the defendant may be sentenced to the upper term. (*People v. Black*, *supra*, 41 Cal.4th at p. 813.)

In this case, the court imposed the upper term for the robbery in part because defendant had numerous prior convictions and juvenile adjudications, including several felonies and a misdemeanor, was "on multiple grants of felony probation when the crime was committed and his progress on probation was unsatisfactory." (Cal. Rules of Court, rule 4.421(b)(2), (4), (5).) The fact the court also stated other reasons for imposing the upper term is immaterial. "[A] single factor in aggravation suffices to support an upper term. [Citation.]" (*People v. Osband* (1996) 13 Cal.4th 622, 730.) Here, the court found no less than three factors.

Defendant acknowledges his offenses were "arguably numerous," but he asserts they were "minor . . . and [he] was never sentenced to prison." But a "'"decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'"' [Citations.]" (*People v. Carmony* (2004) 33 Cal.4th 367, 377.) Moreover, regardless of the nature of the convictions and adjudications, the fact remains defendant made unsatisfactory progress on his "multiple grants of felony probation . . . ." Because defendant has not shown '"the sentencing decision was irrational or arbitrary]'" (*id*. at p. 376), we will not reverse the trial court's "discretionary determination to impose a particular sentence . . .'" (*id*. at p. 377).

DISPOSITION

The judgment of conviction on count 2 for street terrorism is reversed for insufficiency of the evidence. The case is remanded for resentencing. In all other respects, the judgment is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

O'LEARY, J.

IKOLA, J.